2007

Nealy W. Adams v. State of Utah : Reply Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

NEALY W. ADAMS, Petitioner/Appellant, v. STATE OF UTAH, Defendant/Appellee.	: : : : : : : : :	Case No. 20070381-CA

REPLY BRIEF OF APPELLANT

On Appeal from an Order of the Second District Court,
Weber Department, Honorable W. Brent West presiding

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Page:

CASES:

IN THE UTAH COURT OF APPEALS

NEALY W. ADAMS,	:	
	:	
Petitioner/Appellant,	:	Case No. 20070381-CA
	:	
v.	:	
	:	
STATE OF UTAH,	:	
	:	
Respondent/Appellee.	:	

ARGUMENT

I. DUE TO THE INEFFECTIVE ASSISTANCE OF HIS FORMER COUNSEL, ADAMS WAS DENIED THE OPPORTUNITY TO CHOOSE FOR HIMSELF THE BEST DEFENSE TO ASSERT IN THIS CASE

One of the critical issues in this appeal is whether Adams had the right to be apprised of the defense of voluntary intoxication. The State's appellee brief lightly glosses over this issue, attempting to create the appearance that Adams had only one viable defense to present at trial: the so-called "I didn't do it" defense. The State is wrong.

From the very outset of this case, several other viable defenses were clearly available to Adams. Chief amongst those options was the possibility of asserting a diminished capacity defense based on voluntary intoxication.[1] Yet

[1]Another viable option would have been to do nothing more than simply put the State to its burden of proof, requiring the State to prove each and every element of its case beyond a reasonable doubt. This defense is often

Adams was never apprised of the possibility of asserting this defense, because of the deficiencies of his former counsel. The failure by such counsel to adequately recognize and apprise him of his defense options was objectively unreasonable, falling far below applicable standards of competent advocacy. See, e.g., Adams v. State, 2005 UT 62, 123 P.3d 400, 406 ("[C]ounsel **should at least apprise the client of the options available** and give advice based on research, experience, and sound judgment." (emphasis added)). Frankly, such failure by Adams' former counsel amounts to gross negligence.

It cannot be disputed in this case that Adams was **never** timely apprised of the right to assert a defense of voluntary intoxication, either by his trial counsel or by his appellate counsel. The first notice that Adams ever had of the right to assert such a defense came **six years** after his conviction had been entered, well after his direct appeal remedies had been exhausted. Such was Adams' uncontroverted testimony at the post-conviction evidentiary hearing herein, to wit:

"Q. Mr. Adams, when did you first learn [of a]

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invoked with good results.

potential (inaudible) diminished capacity [defense] by virtue of voluntary intoxication? When did you first find that out?

"A. When I first retained the firm of Morrison and Morrison, approximately - I saw the draft brief approximately, oh gosh, October of 2002. That's roughly the time frame.

"Q. How many years after you were convicted?

"A. That would have been six years, a little over six years.

"Q. Prior to that time you'd never been informed that there was that possibility?

"A. Never."

R. at 765 (evidentiary Hearing transcripts at 17-18).

Adams could not choose for himself what defense to assert in this case, because his former counsel never told him of his available options. It was his trial attorney's job to tell him what his options were before trial, and it was his appellate attorney's job to tell him what his options were on appeal, yet neither attorney ever fulfilled this critical responsibility. Neither one ever disclosed to Adams the option of asserting a defense of voluntary

intoxication. Hence, when Adams went to trial, he went with the only defense that had been presented to him, which was not his best defense. And when he pursued his direct appeal remedies, he went with the only defense that was presented to him, which was not his best defense on appeal. The net effect was the entry of a conviction against him that was ultimately affirmed on appeal, much to Adams' great harm and prejudice.

Certainly, the post-conviction court was very concerned with whether Adams had ever been apprised of the defense of voluntary intoxication, prior to seeking post-conviction relief. At the evidentiary hearing below, the post-conviction court asked pointed questions to get at a proper determination of this issue. For example, the court asked expert witness John Caine this question:

"THE COURT: And I assume then under your ethical responsibilities you are to point out the possible defenses that are available?

"THE WITNESS: Absolutely."

R. at 765 (evidentiary Hearing transcripts at 62.)

And the post-conviction court asked counsel during closing argument about their respective positions regarding

the matter. (See R. at 765, evidentiary hearing transcripts at 109-112 and 118-20.) After considering all of the evidence in the case, as well as the arguments of counsel, the post-conviction court was left with no choice but to find that Adams had not been apprised of the right to assert a defense of voluntary intoxication by his former counsel. (See, e.g., Finding of Fact #21.) Yet despite reaching that finding, the post-conviction court shockingly concluded that Adams had not been deprived of effective assistance of counsel. It is this conclusion that is erroneous as a matter of law and must be overturned.

As pointed out in our opening brief, it is the client who is the ultimate decisionmaker in any criminal proceeding, not his attorney. In the instant case, it was Adams who had to make the ultimate decision about what direction his defense would go, not his trial attorney and not his appellate attorney. Despite this being settled Utah law (see, e.g., Adams, 123 P.3d at 406; State v. Wood, 648 P.2d 71, 92 (Utah 1982)), the State wrongfully argued before the post-conviction court that it was defense counsel's job to make the ultimate decisions in the case, not Adams. For example, counsel for the State argued as follows during

closing argument:

> Now I think that maybe you could say counsel does have the responsibility to cover all possible defenses with their client but the ultimate decision of what is to be presented to the jury is not the client's decision, it is counsel's decision because counsel is the one that's on the hook for that decision just like we've seen today... It's defense counsel's ultimate responsibility **after consulting with his client** to decide what defense to raise and in this case [trial counsel] made a reasonable tactical decision to assert the defense that he asserted.

R. at 765 (evidentiary hearing transcripts at 120 (emphasis added)).

The State's erroneous arguments aside, the key point is that Adams was the ultimate decisionmaker in this case, and that he was prevented from making the ultimate decisions on his own behalf, because he had not been adequately presented with his options, due to ineffective assistance of counsel. Hence, Adams' constitutionally protected right to a fair trial, and his constitutionally protected right to receive competent and effective assistance of counsel throughout the entirety of the underlying criminal proceedings, have been undermined and violated in this case. As a result, Adams is entitled to appropriate post-conviction relief. Accordingly, this Court should forthwith set aside his

conviction, and remand the matter for a new trial.

II. THE ORIGINAL TRIAL PROCEEDINGS WERE REPLETE WITH EVIDENCE OF ADAMS' CHRONIC ALCOHOLISM AND DIMINISHED CAPACITY

There should have been no question in this case but that Adams' problem with alcohol was going to be on prominent display at trial. And on display it was. Indeed, the trial transcripts of the original trial proceedings are replete with references to Adams' chronic problem with alcoholism.

Below is a chart outlining the many instances that alcohol was referenced at trial, as well as its profoundly deleterious effect on Adams' mental capacity as noted by the attorneys and witnesses in this case:

ALCOHOL REFERENCE CHART		
PARTY NAME:	**STATEMENT/TESTIMONY:**	**REFERENCE:**
Les Daroczi (prosecutor)	"It was in April that -- Virla Hess will tell you that it was in April that the relationship seemed to be worsening. She thought the defendant was drinking more."	T.T., vol. I, at 11 [R. at 074]

ALCOHOL REFERENCE CHART		
Les Daroczi (prosecutor)	"And, also, there was an incident with a -- with Virla being awakened by the sound of breaking glass, and when she woke up to see what it was, the defendant was coming out of Carleen's room and was intoxicated and -- and didn't have pants on."	T.T., vol. I, at 16 [R. at 074]
Virla Hess (witness)	"Q. All right. Was there a time that you -- some time this year in '95 that you and the defendant begin to -- you begin to have a more stormy relationship? "A. Around December he started drinking real heavy and -- "Q. You are talking about this year? "A. Yes. "Q. Okay. "A. And he was -- he just wasn't hisself (sic)."	T.T., vol. I, at 46 [R. at 074]
Virla Hess (witness)	"He'd just sit there and drink. Sometimes he'd -- I'd have to help him into the bed."	T.T., vol. I, at 47 [R. at 074]
Virla Hess (witness)	"A. And when Wayne came in that night, why, he'd been drinking and he was real ignorant, and he just wasn't hisself (sic)."	T.T., vol. I, at 48 [R. at 074]
Virla Hess (witness)	"Q. Okay. So what happened? "A. Nothing really that night, other than he drank -- "Q. Okay. "A. -- all night long. He was really drunk when he went to bed."	T.T., vol. I, at 48-49 [R. at 074]

ALCOHOL REFERENCE CHART		
Virla Hess (witness)	"A. ... And we more or less argued until I went to bed. He was drunk. He just kept drinking. And it was my understanding that when I went to work Monday, which was the 24th, that when I come home from work at three o'clock on Monday, he was going to be gone. But when I got home, he was laying on the couch sleeping off a drunk."	T.T., vol. I, at 51 [R. at 074]
Virla Hess (witness)	"A. So I left him alone and then when he woke up, I asked him what -- what he was going to do. And he says: What do you mean? And he starts in drinking again ..."	T.T., vol. I, at 52 [R. at 074]
Virla Hess (witness)	"Q. Was there a time that there was -- you were awakened prior to the breaking up by the sound of glass breaking? "A. Yes. "Q. Tell the jury about that. "A. It was -- it was on a Saturday night. Wayne had been drinking really heavy. ..."	T.T., vol. I, at 55 [R. at 074]
Virla Hess (witness)	"Q. Okay. "A. I go into the bathroom and I ask him: What's going on? "Q. And he's sitting there on the toilet. Well, where am I? What am I doing? I finally got him into bed."	T.T., vol. I, at 57 [R. at 074]
Virla Hess (witness)	"Q. Now, isn't it correct that you and Wayne had been -- Wayne, you indicated, was not happy? "A. That's what he'd say when he was drunk, yes. "Q. And he'd -- he'd starting drinking a lot, lot more as time went on after December, is that correct? "A. Yes."	T.T., vol. I, at 60 [R. at 074]

ALCOHOL REFERENCE CHART		
Virla Hess (witness)	"Q. Okay. Would you start with that paragraph and read it on down to where the -- through the yellow underlining? "A. 'On the 22nd of April, Wayne had been gone all day and when he came home, he was pretty much drunk. And he said, what are you going to do if I leave? And I told him nobody was keeping him there. the door -- there was the door, to leave. He just kept on all night.'"	T.T., vol. I, at 61 [R. at 074]
Virla Hess (witness)	"Q. Isn't it correct Carleen will tell you -- well, let me -- that's -- during this period, Wayne was drinking quite heavily? "A. Yes, he was. "Q. To the point of, as you indicated on this night, not really understanding where he was or what he was doing? "A. He done that quite a bit. He'd sit there and drink until he didn't know who he was, where he was. I came home one night to pick up my car after he had it. He was sitting behind the chair in a fetal position. He doesn't know where he is, who he is."	T.T., vol. I, at 102 [R. at 074]
Virla Hess (witness)	"Q. And that's kind of how he appeared that night? "A. He was drunk. "Q. Okay. He was drunk when you went to bed and -- "A. Yes -- "Q. -- still drinking? "A. -- and he was still drinking when I went to bed."	T.T., vol. I, at 102 [R. at 074]
Virla Hess (witness)	"A. I didn't know what was going on. I asked Wayne and he told me he didn't even know where he was. Right to this day, I don't know what went on."	T.T., vol. I, at 104 [R. at 074]

ALCOHOL REFERENCE CHART		
Virla Hess (witness)	"A. Carleen wouldn't say anything. Not that night, no. Carleen would not say anything. She just threw his shirt out and said it was his shirt. And I know Wayne came out of the bedroom, went in and sat on the toilet. The pants were on the floor and he was absolutely naked. But he was drunk, too. "Q. Yes, he was drunk. "A. Yeah, he was."	T.T., vol. I, at 105 [R. at 074]
Virla Hess (witness)	"A. He had been drinking, yes."	T.T., vol. II, at 34 [R. at 074]
Virla Hess (witness)	"Q. Okay. He was there when you got home on the 24th; is that correct? "A. Yes, he was asleep on the couch, sleeping off a drunk."	T.T., vol. II, at 36 [R. at 074]
Nealy W. Adams (defendant)	"Q. When did you first meet Virla Hess. "A. Approximately the latter part of August of 1993. "Q. And where did you meet her at? "A. The American Legion Post ... "Q. Were you drinking then? "A. Yes, I was. "Q. Was she drinking? "A. Yes, she was. "Q. She knew you drank regularly? "A. Yes, she did."	T.T., vol. III, at 6-7 [R. at 074]
Nealy W. Adams (defendant)	"Q. The incident that has been testified to concerning the breaking of the clock, had you been drinking that night? "A. Yes, I had. "Q. Do you recall the incident at all? "A. No, I do not."	T.T., vol. III, at 15 [R. at 074]

ALCOHOL REFERENCE CHART		
Nealy W. Adams (defendant)	"Q. (By Mr. Daroczi) Were there times when -- when after -- after drinking you would the next day not recall what happened after -- what happened while you had been under the influence of alcohol? "A. There was some times, yes. "Q. Okay. Just like -- like the incident you recall about the clock being broken and you coming out of her room? You don't dispute that that happened? "A. I dispute remembering it."	T.T., vol. III, at 18 [R. at 074]
Nealy W. Adams (defendant)	"Q. Okay. Because there were times when -- other times when you had been drinking and not remember what you had done after -- under the influence of alcohol; is that correct? "A. I could remember Virla helping me into the -- to bed. "Q. Well, no. no. I'm -- yes, and we've covered that. And like you said, there were other incidents where you wouldn't remember what you had done under the influence of alcohol the next day. "A. There were some times."	T.T., vol. III, at 18 [R. at 074]

Again, the question must be asked: should Adams' trial counsel have foreseen how prominent the alcohol issue was going to be at trial? Of course he should have. It was his obligation to foresee this. He was on notice that it was going to be featured as a prominent part of the case. From the discovery in this case, he was on notice that it was going to play a large role at trial. It was prominently

featured in the two preliminary hearings conducted in this matter, and it was prominently featured in the police reports and discovery material that was on file and made available to counsel. (See R. at 765, evidentiary hearing transcripts at 30-31; see also R. at 074, Trial Transcripts, vol. I, at 61.)

Moreover, trial counsel was fully aware of Adams' alcohol tendencies, as counsel was a recovering alcoholic himself, and Adams often smelled of alcohol when the two met to prepare the case in advance of trial. (R. at 765, evidentiary hearing transcripts at 12-13, 20.) At a minimum, Adams' smell of alcohol should have been a major signal to trial counsel that his client had a chronic alcohol problem, which could have been utilized advantageously by asserting it as an affirmative defense.

As it turned out, Adams' chronic alcohol problem was not only a featured aspect at trial, but it was also a featured aspect of Adams' appeal. Indeed, the two appellate court opinions issued as part of Adams' direct appeal make multiple references to Adams' chronic alcohol problem. See, e.g., State v. Adams, 955 P.2d 781, 782-83 (Utah Ct. App. 1998); State v. Adams, 5 P.3d 642, 644 (Utah 2000). Yet

unfortunately for Adams, this issue was neither discussed nor portrayed in a light that would have been positively helpful to him, in terms of considering it as a potential defense. Instead, it was presented in a starkly negative light, with Adams being painted as a bumbling drunk who probably deserved to be convicted of some violation of the penal code.

Suffice it to say that Adams' severe alcohol problem (marked by major episodes of binge drinking, blackouts, and complete memory loss) was a key part of the criminal proceedings below, both before, during, and after Adams' trial. Regrettably, Adams' former counsel failed to appreciate its significance, and failed to ever timely assert it as a defense. As a result, Adams had a conviction entered against him that was the direct and proximate result of ineffective assistance of counsel, in violation of his state and federal constitutional rights. Inasmuch as Adams did not receive effective assistance of counsel in the underlying proceedings below, his conviction cannot stand, and must now be set aside. This Court should not countenance any further deprivation of Adams' constitutional rights. Instead, it should forthwith reverse the post-

conviction court's decision, and remand this matter for a new trial.

III. A VOLUNTARY INTOXICATION DEFENSE WAS NOT INCONSISTENT WITH AN "I DIDN'T DO IT" DEFENSE

Another important question in this appeal is this: could Adams have relied on both an "I didn't do it" defense, as well as a voluntary intoxication defense at trial? Absolutely. He could have relied on both of these defenses below, without any inconsistency in his position. The option was certainly available to him to invoke an "I didn't do it" defense in response to the rape count, while simultaneously relying on a voluntary intoxication defense in response to the forcible sexual abuse count. There would have been no inconsistency in this approach, provided that his trial counsel competently performed his professional duties in this case by timely asserting the defense, by retaining an expert witness to adequately support it, and by carefully preparing Adams' testimony at trial, in the event Adams needed to testify. (R. at 765, evidentiary hearing transcripts at 50-53, 55, 59-61.)

In terms of contesting the rape count, trial counsel frankly did not have an overly difficult task. Admittedly,

this count was the more serious of the two counts that were pending against Adams, yet it was also considerably weaker in terms of evidentiary support. Indeed, reasonable doubt was everywhere to be found in challenging the rape count, as even the State's own medical expert in the case concluded that Carleen Hess--the accuser herein--was virginal in her sexual make up, finding no evidence of intercourse and no evidence of any kind of physical or sexual abuse. (R. at 074 (T.T., vol. II, at 5-7).) Moreover, Carleen's own testimony was, while no doubt sympathetic, not overly strong and at times extremely difficult to follow. Such testimony proved to be ambiguous, contradictory, vague, and inconsistent. Again, it should not be forgotten that such testimony was improperly bolstered by other witnesses at trial, as noted by both this Court and the Utah Supreme Court on direct appeal. Adams, 955 P.2d at 786; Adams, 5 P.3d at 647-48.

All things considered, there was only a remote likelihood that Adams would be convicted of the rape count at trial, and he was in fact rightfully acquitted of it. Unfortunately, his trial attorney failed to give the jury an opportunity to consider Adams' best defense to the forcible

sexual abuse count, i.e., the defense of voluntary intoxication. Indeed, trial counsel gave the jury almost nothing to consider in terms of defeating this count. It should come as no surprise, then, that Adams was convicted of this charge, due in large part to grossly ineffective advocacy by his trial counsel.

The essential point is that Adams very well could have relied on a voluntary intoxication defense at trial, interposing it as a defense to the sexual abuse count, while simultaneously relying on an "I didn't do it" defense with respect to the rape count. These were not inconsistent defenses. The only problem is that his trial counsel failed to competently appreciate the viability of utilizing a voluntary intoxication defense. This blatant mistake was unfortunately repeated on appeal, much to Adams' great detriment.

In short, Adams could have (and, according to defense expert John Caine, *should have*) legitimately invoked a voluntary intoxication defense in this case, but he was prevented from doing so because he was never even told of the right to invoke it. Because Adams' former counsel failed to competently apprise Adams of his available defense

options in this case, Adams has received grossly ineffective of counsel. The proper remedy is to afford Adams a new trial, in order to ensure a fair and just outcome in this case, and to ensure that Adams' constitutional right to receive effective assistance of counsel is upheld. See State v. Hales, 152 P.3d 321 (Utah 2007) (vacating defendant's conviction and awarding new trial where defendant received ineffective assistance of counsel); State v. Thomas, 743 P.2d 816 (Wash. 1987) (same); State v. Tilton, 72 P.3d 735 (Wash. 2003).

IV. THE STATE'S ARGUMENT THAT THERE WERE MULTIPLE INSTANCES OF ABUSE IS ERRONEOUS

The State continues to argue in this case that there were multiple instances of abuse, not a single episode. Hence, the argument goes, Adams would not have been able to invoke a voluntary intoxication defense at trial without showing that he was intoxicated on each of the alleged "multiple" instances of abuse. The State's position is untenable.

At trial, the State did not establish multiple instances of abuse. Again, it must be kept in mind that only a single count of forcible sexual was charged in the

information (not multiple counts), and only a single count was set forth in the jury instructions. Simply put, the State's argument that there were multiple instances of abuse is a red herring. Since this issue has already been adequately covered in Adams' appellant brief (see Brief at 41-44), it need not be further addressed herein.

V. THE POST-CONVICTION COURT'S DECISION TO OVERRULE ADAMS' WELL-TAKEN OBJECTIONS TO THE STATE'S PROPOSED ORDER SHOWS THAT THE COURT MECHANICALLY ADOPTED THAT ORDER, SURRENDERING AN IMPORTANT JUDICIAL FUNCTION TO ADAMS' OPPONENT

Finally, it is necessary to revisit the issue of the post-conviction court's decision to adopt the State's proposed Order without revision. With all due respect to the post-conviction court, surely one of many objections that Adams raised in opposition to the State's proposed Order had merit. If indeed only one objection had merit, then at a minimum the post-conviction court should have sustained that objection, rather than completely overruling the entirety of Adams' objections.

By overruling all of Adams' objections, and by entering the State's proposed order without revision, the post-conviction court clearly gave the impression to Adams that

it was uninterested in hearing from him, and that it was simply going to adopt his opponent's order notwithstanding any valid objection to the same. In other words, the post-conviction court clearly gave Adams' the impression that it was mechanically adopting the State's proposed order, thereby surrendering an important judicial role to Adams' opponent.

There is good reason why Utah law adheres to the longstanding policy of disapproving a trial court's mechanical adoption of a party's proposed findings of fact, conclusions of law, and order. See Boyer Co. v. Lignell, 567 P.2d 1112, 1113 (Utah 1977). Underpinning that policy is the need for courts to independently reach their own rationale and analysis for resolving the issues in controversy. For a trial court to turn over this important task to one of the litigants in a case is to surrender a nondelegable core judicial function.

The State is treating this issue as unimportant. It is not unimportant. Adams' objections to the State's proposed order were well-taken, and should not have been summarily overruled. To the extent that this Court determines that the post-conviction court mechanically adopted the State's

proposed order without proper cause, then Adams is entitled to appropriate relief, such as the entry of an order that accurately reflects the post-conviction court's own independent analysis and conclusions, not the analysis and conclusions advocated by the State.

CONCLUSION:

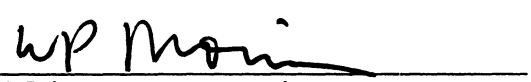
Adams has now spent more than 12 years serving a sentence on a conviction that quite likely would not have been entered against him had his former counsel adequately fulfilled their duties and responsibilities in this case by rendering effective assistance of counsel. It was below an objective standard of reasonableness for Adams' former counsel to fail to appreciate the significance of Adams' chronic alcohol problem. It was below an objective standard of reasonableness for Adams' former counsel to fail to appreciate the significance of utilizing a voluntary intoxication defense at trial and on appeal. And it was **way below** an objective standard of reasonableness for Adams' former counsel to fail to ever apprise Adams of his right to rely upon a defense of voluntary intoxication. All of these deficiencies combined must inexorably lead to the conclusion

that Adams has been deprived of effective assistance of counsel.

Justice now demands that Adams' wrongful conviction be set aside. This Court should vacate the conviction, and in so doing afford Adams a new trial, wherein his constitutional right to receive effective assistance of counsel is recognized, protected, and upheld. In the interest of justice, this Court should therefore reverse the decision of the post-conviction court, set aside Adams' conviction, and remand this matter for a new trial.

RESPECTFULLY SUBMITTED THIS 16th DAY OF MAY, 2008.

MORRISON & MORRISON, L.C.



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CERTIFICATE OF SERVICE

This certifies that on the 16th day of May, 2008, I caused to be mailed, via U.S. mail postage-prepaid, two true and correct copies of the foregoing Reply Brief of Appellant to the following:

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